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NAZERRA HANIE KHAIRUDIN v. NAZLAN BAHARUDIN

HIGH COURT MALAYA, KUALA LUMPUR
DARRYL GOON SIEW CHYE JC
[CIVIL APPEAL NO: WA-12BNCVC-58-06-2018]
12 DECEMBER 2018

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TORT: *Defamation – Slander – Defences – Allegation of slander – Whether hearsay – Whether impugned statements referred to appellant – Whether capable of being defamatory – Whether comment warranted and made on occasion of qualified privilege – Whether defences of fair comment and qualified privilege available – Whether malice established to rebut defences*

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The appellant was formerly a media and publicity administrator at the Home of Hope, Rumah Harapan Al-Khaadem, a nurturing home for disadvantaged children, orphans and single mothers. The respondent was at all material times, the Honorary Secretary of Pertubuhan Al-Khaadem ('PAK'), a humanitarian welfare organisation. The Home of Hope was run by PAK. The appellant's services with PAK was terminated and subsequently, the President of PAK received a report entitled 'Laporan dan Cadangan Aktiviti di Rumah Harapan Al-Khadeem' ('report') prepared by the appellant. The report set out several photographs and statements of poor conditions in the Home of Hope and recommendations. Following the report, the President of PAK directed the Home of Hope Sub-Committee to look into the allegations in the report. Sometime in early 2016, PAK discovered that the report had been circulated among members of PAK, many of whom expressed concern. As a result, the main committee of PAK decided to commission an independent task force to investigate the contents of the report. A report was subsequently prepared by the task force setting out its conclusions and recommendations. Subsequently, during a slide presentation after the AGM of PAK, the respondent allegedly uttered the following words: 'We have received a report from an ex-staff from Home of Hope trying to shame our organisation by showing that male children/children in the Home of Hope were abused. Nazerra has lied until she is willing to produce pictures which are untrue to bring down our organisation.' The appellant thus commenced an action in the Sessions Court against the respondent which was founded on tort of defamation alleging that the respondent had slandered her in the course of the oral briefing. Not being a member of PAK herself, the appellant was not present at the briefing but, instead, relied on information provided to her by one Cik Zarifah. Cik Zarifah however, did not testify at the trial. Instead, one Shahryir Ahmad Taff ('SP2'), who was present at the briefing, testified as to what the respondent said at the briefing. The Sessions Court Judge ('SCJ'), in dismissing the appellant's action, held that: (i) the alleged slanderous statements were not proven; (ii) the appellant was not present at

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the briefing and had relied only on what was reported to her by Cik Zarifah, who was not called to testify; (iii) what the appellant was told was not admissible as it was hearsay; and (iv) the appellant had failed to discharge the burden of proving that the alleged slander was uttered by the respondent. Notwithstanding having held that it was not proven that the alleged slanderous statements were made by the respondent, the SCJ went on to hold that the defences of fair comment, qualified privilege and justification had been established by the respondent. Hence, the appeal.

Held (dismissing appeal with costs):

(1) It was not sufficient to prove that Cik Zarifah reported to the appellant that the respondent had briefed the members of PAK about the report and the findings of the task force. It must be established that what Cik Zarifah had reported, *ie*, what the respondent said, was actually said by the respondent. Cik Zarifah should have been called to testify and made available to be challenged as to whether what she maintained she had heard was accurate or, indeed, whether she actually heard what the respondent said or whether she was even present at the meeting. Whereas, in SP2's evidence-in-chief, he did not testify that the respondent said that the appellant had lied. Under the cross-examination, he did not remember anything else except for the statement of the respondent. In the circumstances, it could not be concluded with any degree of certainty that the SCJ was 'plainly wrong' in his conclusion as to SP2's evidence. (paras 26 & 28)

(2) The impugned statements were made at a meeting with members of PAK in relation to the report and the task force's findings. The appellant's name was mentioned and the appellant was, before that, serving with PAK. Clearly, the impugned statements referred to the appellant and were capable of being defamatory and could bear the meaning ascribed to them as set out in the statement of claim. However, the respondent's comment that the appellant had produced pictures which were untrue to bring down PAK was clearly a matter of public interest as it concerned the treatment of children in the Home of Hope under the care of PAK. In addition, the respondent's comment was made after the task force had produced its findings. The findings of the task force were such that the comment made was warranted. (paras 30 & 33)

(3) The respondent, in his capacity as the Secretary of PAK, was merely briefing its members about allegations pertaining to PAK in light of the findings of the task force. As the Secretary of PAK, the respondent and members of PAK had mutuality of interest in the contents of the report and the findings of the task force. It was also a matter of social responsibility that the issues raised in the report be investigated and the

A outcome made known to members of the very organisation whose management of their welfare homes were challenged. Therefore, the briefing was clearly an occasion of qualified privilege. (paras 33 & 34)

(4) The intent of the briefing was to share with the members of PAK the findings of the task force in regard to the report. The fact that the briefing
B was given after the investigation by the task force had been completed, and its conclusions given, supported the contention that there was no malice towards the appellant. In addition, the respondent had no dealings with the appellant. The respondent had never met the appellant until the occasion of a mediation meeting, after the action was filed. As
C such, there was no reason why the respondent would have had any malicious intent towards the appellant. Hence, the SCJ had not erred in holding that the defences of fair comment and qualified privilege were made out. (paras 35 & 36)

(5) Although the appellant pleaded a claim for special damages, the
D particulars provided disclosed that these were in the form of mental and emotional distress, problems with self-confidence and difficulty in getting a job. Whether mental or emotional distress come within the meaning of special damages for the purposes of slander is dubious. In any event, there was no evidence provided by the appellant of her
E alleged special damages. As no special or actual damage was proven, the appellant's cause of action in the tort of slander was not made out. (paras 40 & 41)

Case(s) referred to:

Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors [2003] 1 CLJ 585 CA ***(refd)***
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*Chok Foo Choo v. The China Press Bhd [1999] 1 CLJ 461 CA****(refd)***
Clarke v. Edinburgh Tramways [1919] SC (HL) 35 ***(refd)***
Datuk Seri Anwar Ibrahim v. Wan Muhammad Azri Wan Deris [2015] 2 CLJ 557 HC ***(refd)***
Jameel (Mohammed) and Another v. Wall Street Journal Europe SPRL (No 2) [2007]
G *1 AC 359* ***(refd)***
Morrell v. International Thomson Publishing [1989] 3 All ER 733 ***(refd)***
Pardeep Kumar Om Parkash Sharma & Anor v. Abdullah Sani Hashim & Another Appeal [2008] 1 LNS 669 CA ***(refd)***
Re B (A Child) (Care Order: Proportionality: Criterion For Review) [2013] 3 All ER 929 ***(refd)***
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Reynolds v. Times Newspapers Ltd [2001] 1 AC 127 ***(refd)***
S Pakianathan v. Jenni Ibrahim & Another Case [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 SC ***(refd)***
Subramaniam v. PP [1956] 1 LNS 115 PC ***(refd)***
Tun Datuk Patinggi Hj Abdul-Rahman Ya'kub v. Bre Sdn Bhd & Ors [1995] 1 LNS 304
I *HC* ***(refd)***

Legislation referred to:
Defamation Act 1957, ss. 4, 5, 9
Rules of Court 2012, O. 78 r. 3(2)

Other source(s) referred to:
Gatley on Libel and Slander, 11th edn, p 155 para 5.2

For the appellant - Wan Azmir Wan Majid & Nor Emelia Iszeham; M/s Hafarizam Wan & Aisha Mubarak
For the respondent - S Murthi & Ahmad Hanafi; M/s S Murthi & Assocs

Reported by S Barathi

JUDGMENT

Darryl Goon Siew Chye JC:

[1] This was an appeal against the decision of the Sessions Court in Kuala Lumpur that was handed down on 25 May 2018, dismissing the appellant's action against the respondent with costs of RM20,000.

[2] The appellant's action against the respondent was founded in the tort of defamation. It was alleged that the respondent had slandered the appellant in the course of an oral briefing given at a meeting conducted by the respondent.

The Background

[3] The appellant was formerly a Media & Publicity Administrator at the Home of Hope, Rumah Harapan Al-Khaadem. The respondent was at all material times, the Honorary Secretary of Pertubuhan Al-Khaadem ("PAK").

[4] PAK is an association established in 1984. It is a humanitarian welfare organization founded upon the teachings of the Qur'an and Sunnah. The Home of Hope is a nurturing home for disadvantaged children, orphans and single mothers run by PAK.

[5] By a letter of termination dated 26 October 2015, the appellant's services with PAK were terminated. The appellant then referred the termination of her services to the Selangor Labour Office and in consequence she was paid a sum of RM1,083.87 in full and final settlement of the termination of her services.

[6] On 2 November 2015, a six page document entitled, "Laporan Dan Cadangan Aktiviti Di Rumah Harapan Al- Khaadem" ("report") was handed to the President of PAK. The appellant admits to having prepared this report and this is set out in her witness statement.

[7] In this report are set out several photographs. One of the photographs in the report depicted several children within a room behind a metal grille. Another depicts a child lying on the floor in a room, also behind a metal grille. The report contained statements of poor conditions in the Home of Hope, in Jalan Cempaka, Sungai Kayu Ara, Petaling Jaya and recommendations.

[8] Following the report, the President of PAK directed the Home of Hope Sub-Committee to look into the allegations in the report. Sometime in early 2016, PAK discovered that the report had been circulated among members of PAK many of whom expressed concern. As a result, the main committee of PAK decided to commission an independent task force to investigate the contents of the report.

[9] On 7 February 2016, the respondent lodged a police report against the appellant and the allegations in the report.

[10] A report was subsequently prepared by the task force headed "Assessment Report For Alleged Abuse" dated 18 February 2016. Paragraph 4.0 of the task force's report, which sets out its conclusions and recommendations, is reproduced below:

> 4.0 Conclusion & Recommendation
>
> The findings and evaluation of this report are justified based on the investigation carried out by PTF on site. Hence, the conclusion and recommendation of this assessment are derived solely from the investigation carried by PTF on the alleged abuse issue.
>
> 4.1 Conclusion
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> PTF's conclusion are as follows:
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> 1. No abuse took place
> 2. The pictures were portrayed in a wrong manner
> 3. Nazerra had negative intentions by instructing the children to act in order for her to take pictures
> 4. Nazerra also failed to understand the situation at HOH and did not have the passion, dedication and understanding to carry out her duty
> 5. She also lacks the ability to communicate with the superior and follow instruction correctly.
> 6. The Bilik Tenang is an effective way to discipline the children and JKM has no objection to it
>
> 4.2 Recommendation
>
> To avoid similar issues from repeating again, PTF feels that a standard operating procedure was not made available for the staff to refer. Therefore PTF would like to recommend as follows:
>
> (a) To set up SOP for scope of work of each staff at PAK, HOH & MTBR

(b) To set up limit of authority for all full time staffs in PAK, HOH & MTBR

(c) To set up SOP for the activities/processes at PAK, HOH & MTBR

[11] On 28 March 2016, PAK had its annual general meeting. After the AGM, the respondent, as the secretary of PAK, gave a slide presentation. This slide presentation was to brief members of PAK on the findings of the independent task force. In the course of this presentation, it was alleged that the respondent uttered the following words:

> We have received a report from an ex staff from Home of Hope trying to shame our organisation by showing that male children/children in the Home of Hope were abused. Nazerra has lied until she is willing to produce pictures which are untrue to bring down our organisation.
>
> (Terjemahan ke dalam Bahasa Melayu)
>
> Kami telah terima satu laporan daripada bekas pekerja Home of Hope yang cuba untuk memburukkan pertubuhan kami dengan menunjukkan kononnya kanak-kanak lelaki di Rumah Harapan Al-Khaadem telah didera. Nazerra adalah seorang penipu sehingga beliau sanggup untuk memalsukan gambar-gambar untuk menjatuhkan imej pertubuhan kami.

[12] On 23 April 2016, the appellant lodged two police reports.

[13] Not being a member of PAK herself, the appellant herself was not present at the briefing given by the respondent. Instead, she relied on information provided to her by one Cik Zarifah. Cik Zarifah however, did not testify at the trial. Instead one Shahryir Ahmad Taff ("SP2"), who was present at the briefing, testified as to what the respondent said at the briefing. SP2 testified that the respondent had spoken about the report which contained untruths and photographs of children abused with the intention of damaging the Home of Hope. Although SP2 did not seem to remember much of anything else, under cross-examination, he did maintain that he was shocked by the revelation that someone had lied and fabricated pictures to bring down the association. This was something that had not been done and that was why he remembered this part of what was said by the respondent.

The Appellant's Claim

[14] The appellant's claim was that she had been slandered by reason of what the respondent had said. The appellant alleged that the words uttered by the respondent referred to her and that they meant, and were understood to mean, that:

(a) Plaintiff secara niat jahat telah memalsukan gambar-gambar kanak-kanak di Rumah Harapan Al-Khaadem;

(b) Plaintif merupakan seorang yang telah memburukkan Rumah Harapan Al-Khaadem;

A (c) Plaintif telah dengan sengaja mengada-adakan cerita mengenai layanan buruk pihak Rumah Harapan Al-Khaadem terhadap kanak-kanak berdasarkan gambar-gambar kanak-kanak di Rumah Harapan Al-Khaadem;

(d) Plaintif memberikan tanggapan yang negative terhadap pengurusan di Rumah Harapan Al-Khaadem; dan B

(e) Plaintif dengan sengaja mencari kesalahan tentang sesuatu yang tidak wujud di Rumah Harapan Al-Khaadem.

English Translation

C (a) The Plaintiff had maliciously fabricated the photos of the children in the Home of Hope;

(b) The Plaintiff is a person who had tarnished the image of the Home of Hope;

(c) The Plaintiff deliberately created a story on the ill treatment committed by the Home of Hope towards the children based on the D photos of the children of the Home of Hope;

(d) The Plaintiff had pictured negative impression against the administration of the Home of Hope; and

(e) The Plaintiff intentionally finding wrongdoings of matters which E had not occurred in the Home of Hope.

[15] Clearly, the impugned statements, if proven to have been made by the respondent, were *ex facie* defamatory. In essence, the impugned statements accused the appellant of deliberately publishing untruths of ill treatment of children in the Home of Hope.

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The Defence

[16] The respondent denied that he made the statements pleaded as the slander in the statement of claim. According to the respondent, during the briefing session, he merely explained to the PAK members, present the G report and the allegations therein. Extracts of the report were also shown to the PAK members present. In his witness statement, the respondent also testified that he had informed the PAK members that a task force had been set up to investigate the report and the task force had, "... found that the allegations in the appellant's report were not true ...".

H **[17]** The respondent also maintained that the alleged slander if made was justified. In so far as justification was concerned, the respondent relied on the finding in the task force's report that had concluded that there was no abuse and that the "pictures were portrayed in a wrong manner".

[18] There was also an investigation by the police. Sargent Abdul Hamid I bin Mohamad testified as "SD3" at the trial. He referred to the police report lodged by the respondent dated 7 February 2016. He was also aware that the

appellant had lodged police reports regarding the abuse of children in Home of Hope. SD3 testified that pursuant to the reports, Polis Diraja Malaysia ("PDRM") sent several officers to monitor the conditions at the Home of Hope. This was done without informing the management of the Home of Hope. SD3 himself was part of the team involved in this exercise. SD3 testified that the situation at the Home of Hope was found to be calm and the children carried out their daily activities in a normal fashion. It was thus concluded that no element of crime was disclosed. SD3 testified that he did contact the appellant by telephone for an interview but each time she was contacted she was reluctant to cooperate and put down the telephone. As there was no cooperation by the appellant, and there being no element of crime found, PDRM referred the appellant's police report to the Department of Social Welfare, Jabatan Kebajikan Masyarakat ("JKM").

[19] There then followed an investigation by JKM. Umar Zakir bin Sayuti from JKM Daerah Klang testified at the trial as "SD4". He testified that he headed a team to investigate the allegations made by the appellant. After his investigations, he concluded that there was no abuse of children as alleged by the appellant.

[20] The defence of fair comment and s. 9 of the Defamation Act 1957 were also pleaded and raised by the respondent. The respondent contended that the briefing by the respondent was based on a report by the Task Force which was commissioned by the main committee of PAK and the respondent's comments were in respect of the report.

[21] The respondent also pleaded the defence of qualified privilege. It was contended that the respondent, in his capacity as the Secretary of PAK, was entrusted with and had the responsibility and interest to brief the members of PAK in regard to the allegations in the report and the findings of the task force. Correspondingly, it was maintained that the members of PAK had the necessary right and interest to be informed of the allegations and the findings of the task force.

[22] The respondent also contended that this action in slander cannot be maintained because the appellant did not suffer any actual loss or damage and the circumstances were such that the exceptions under the Defamation Act 1957 do not apply. It was, however, pleaded by the appellant in the statement of claim that she had suffered actual damage by reason of the slander. She alleged that she had suffered problems with self-confidence, difficulties in securing a job, mental and emotional distress requiring counselling and it had affected her relationship with her family and friends. Although having so alleged, under cross-examination, the appellant admitted that she had led no evidence of any of the alleged damage.

A **The Decision Of The Sessions Court**

[23] The Sessions Court held that the alleged slanderous statements were not proven. The learned Sessions Court Judge held that the appellant was not present at the briefing and had relied only on what was reported to her by Cik Zarifah. Cik Zarifah however was not called to testify. The learned
B Sessions Court Judge held that what the appellant was told was not admissible as it was hearsay. It was further held that the appellant had failed to discharge the burden of proving that the alleged slander was uttered by the respondent.

C **[24]** Notwithstanding having held that it was not proven that the alleged slanderous statements were made by the respondent, the Sessions Court nevertheless went on to hold that the defences of fair comment, qualified privilege and justification had been established by the respondent.

The Appellant's Appeal

D **[25]** It is axiomatic that in an action in defamation, be it slander or libel, the appellant bears the burden of proving that defamatory statements were published by the respondent of and concerning the appellant. In *Pardeep Kumar Om Parkash Sharma v. Abdullah Sani Hashim & Another Case* [2008] 1 LNS 669; [2009] 2 MLJ 685, Suriyadi JCA (as His Lordship then was)
E stated as follows:

> [24] To succeed in an action of slander, as in libel, a plaintiff has to prove that the matter complained of, which emanated from the defendant is defamatory, refers to him (an issue of identification) and was transmitted to a third person (publication). The burden of establishing those
F ingredients at the outset rests on the plaintiff. Thereafter, if the plaintiff has succeeded in establishing the three ingredients, certain presumptions in favour of the latter then follows, namely that the matter complained of is true, and that in actions of slander where it is actionable *per se*, damage was caused to the plaintiff. The defendant in defence must rebut and establish that the remarks made were true and that the plaintiff has
G suffered no damage.

Although His Lordship dissented, in part, in the decision of the Court of Appeal in that case, his statement of the law was not the subject of any disagreement.

H **[26]** In regard to the case at hand, it was held as a matter of fact that the impugned slanderous words pleaded in the statement of claim were not proven to have been published by the respondent. The appellant contended that what Cik Zarifah said to her was not hearsay. The appellant argued that all that needed to be proven was that the statement was made by Cik Zarifah to her, and not the truth of the statement, citing the favorite of hearsay
I exceptions, the rule in *Subramaniam v. PP* [1956] 1 LNS 115; [1956] 1 MLJ 220. However, it is not sufficient to prove that Cik Zarifah reported to the

appellant that the respondent had briefed the members of PAK about the report and the finding of the Task Force. It was also necessary to establish that what Cik Zarifah had reported ie, what the respondent said, was actually said by the respondent. Cik Zarifah should have been called to testify and made available to be challenged as to whether what she maintained she had heard was accurate or, indeed, whether she actually heard what the respondent said or whether she was even present at the meeting. There was then the evidence of SP2. In his evidence in chief, he did not testify that the respondent said that the appellant had lied. He testified that the respondent said, "... tujuan Nazerra buat laporan ini ialah untuk membusukkan the Home of Hope and Al Khaadem". Under cross-examination, he did not remember anything else except for the statement of the respondent. Under cross-examination he said:

> ... it is shock to me to hear the secretary informing all members after the AGM that somebody had lies and somebody had created fabricated pictures, etc, etc. to bring down the pertubuhan. That's why I remember that very clearly and the rest to me is not that important anymore because its something has not been done in the how many years being the member of the pertubuhan.

Having heard the evidence of SP2 and seen him testify, the learned Sessions Court Judge, in her grounds of judgment, stated that:

> [17] Plaintif juga bergantung kepada keterangan saksi SP2 yang memberi keterangan berkenaan taklimat yang diberikan oleh Defendan berkenaan Laporan Plaintif selepas Mesyuarat Agung Tahunan Pertubuhan Al-Khaadem yang dihadiri oleh SP2. Walau bagaimanapun, didapati bahawa walaupun SP2 menyatakan bahawa Defendan telah mengeluarkan perkataan-perkataan fitnah semasa pembentangan tersebut, SP2 tidak dapat pula mengingati kandungan taklimat yang diberikan oleh Defendan. Keterangan SP2 ini bercanggah dengan keterangan Plaintif yang menyatakan bahawa semasa Plaintif berjumpa dengan SP2 selepas taklimat oleh Defendan, SP2 tidak memaklumkan apa-apa kepada Plaintif berkenaan perkataan-perkataan fitnah yang didakwa dikeluarkan oleh Defendan. Jelas kepada Mahkamah ini bahawa keterangan SP2 sukar diterima kesahihannya memandangkan terdapat selective memory oleh SP2.

In the often-quoted decision in *Clarke v. Edinburgh Tramways* [1919] SC (HL) 35 at p. 36, Lord Shaw stated:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the trial judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them

A or heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In the courts of justice, in the ordinary case, things are more evenly divided: witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them, B which can never be reproduced in the printed page. What in the circumstances, thus psychologically put, is the duty of the appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put himself, as I now do in this case, the question: am I - who sit here without the advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and C tried the case - in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

D As was stated by the Court of Appeal in *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors* [2003] 1 CLJ 585 at p. 598, the above-cited passage is one that has been quoted on numerous occasions by our courts.

[27] Somewhat more recently, and equally germane to the issue of finding of facts and an appellate court's approach, Lady Hale in her judgment in the E UK Supreme Court case of *Re B (A Child) (Care Order: Proportionality: Criterion For Review)* [2013] 3 All ER 929 stated thus:

> [200] ... The Court of Appeal has jurisdiction to hear appeals on questions of fact as well as law. It can and sometimes does test the judge's factual findings against the contemporaneous documentation and inherent F probabilities. But where findings depend upon the reliability and credibility of the witnesses, it will generally defer to the trial judge who has had the great advantage of seeing and hearing the witnesses give their evidence. The question is whether the findings made were open to him on the evidence. As Lord Hoffmann explained in *Biogen Inc v. Medeva Plc* [1997] RPC 1, the need for appellate caution is 'based upon much more solid G grounds than professional courtesy'. Specific findings of fact are 'inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance ...' .

H **[28]** Having regard to what is recorded in the notes of evidence and submissions by learned counsel for the parties, this court cannot conclude with any degree of certainty that the learned Sessions Court Judge was "plainly wrong" in his conclusion as to SP2's evidence.

I **[29]** Notwithstanding having held that it was not proven that the respondent published the slanderous statements, the learned Sessions Court Judge nevertheless also held that the defences of fair comment, qualified privilege and justification, were made out. In order to consider these

defences, it is necessary for the court to decide whether the impugned statements, if proven to have been made, referred to the appellant, were capable of being defamatory and bore the meaning alleged (see *Chok Foo Choo v. The China Press* [1999] 1 CLJ 461).

[30] The impugned statements were made at a meeting with members of PAK in relation to the report and the task force's findings. The appellant's name was mentioned and the appellant was, before that, serving with PAK. Clearly, the impugned statements referred to the appellant. The court is also satisfied that the impugned statements were capable of being defamatory and could bear the meaning ascribed to them as set out in the statement of claim.

[31] In relation to the defence of fair comment, s. 9 of the Defamation Act 1957 provides as follows:

> 9. In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

[32] For the defence of fair comment, it is necessary to distinguish between what were the facts and what were comments on the facts (see *Datuk Seri Anwar Ibrahim v. Wan Muhammad Azri Wan Deris* [2015] 2 CLJ 557; [2014] 9 MLJ 605). In *Tun Datuk Patinggi Hj Abdul-Rahman Ya'kub v. Bre Sdn Bhd & Ors* [1995] 1 LNS 304; [1996] 1 MLJ 393 at p. 408, Richard Malanjum J (as His Lordship then was), stated thus of the defence of fair comment:

> For the defence of fair comment, in order to succeed the following basic elements must be established by the defendants, namely:
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> (i) that the words complained of are comments, though they may consist of or include inference of facts;
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> (ii) that the comments are on a matter of public interest; and
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> (iii) that the comments are based on facts, truly stated. They must also be fair and which a fair-minded person can honestly make on the facts proved (see *JB Jeyaretnam*).
>
> On element (i), it is settled law that a comment is a statement of opinion on facts truly stated. A libellous statement of fact is not a comment or criticism on anything (see *Lee Kuan Yew v. JB Jeyaretnam* [1979] 1 MLJ 281). In order to decide whether a statement is capable of being a comment or a statement of fact, should be gathered from the document wherein the words complained of are found. There is no necessity to look at other documents, though relevant, to come to such determination (see *Telnikoff v. Matusevitch* [1991] 4 All ER 817).

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> It has also been stated in our court in the case of *Abdul Rahman Talib v. Seenivasagam & Anor* [1965] MLJ 142, and which I have no reason to differ, that a person cannot avail himself of any fact as justifying his comment of which he was ignorant at the time when he published the words complained of. It is the state of mind of a defendant when he published the defamatory words that is most material.

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[33] On the facts of this case, in light of the report, the respondent had made the comment that the appellant had produced pictures which were untrue to bring down PAK. The issue that was being addressed was clearly a matter of public interest as it concerned the treatment of children in the Home of Hope under the care of PAK. In addition, the respondent's comment was made after the task force had produced its findings. In fact, the briefing was about the report and the task force's findings. In view of the task force's findings, it cannot be said that the respondent's comment about the appellant's report was unfair or not an honest one. The respondent, in his capacity as the secretary of PAK, was merely briefing PAK members about allegations pertaining to PAK in light of the findings of the task force and the findings of the task force were such that the comment made was warranted.

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[34] In so far as qualified privilege is concerned, it was pleaded that there was mutuality of interests between the respondent and the members of the PAK who attended his briefing. In addition, it was pleaded that the respondent, as secretary of PAK and on behalf of the main committee of PAK, had the social and moral responsibility to apprise its members about the report and the findings of the task force in respect of the report. These are occasions of qualified privilege known to the common law. In *S Pakianathan v. Jenni Ibrahim & Another Case* [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233; [1988] 2 MLJ 173 at p. 241 (CLJ); p. 178 (MLJ), Wan Hamzah SCJ, delivering the decision of the Supreme Court, stated thus:

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> However, there are occasions upon which, on grounds of public policy and convenience, a person may, without incurring legal liability, make statements about another which are defamatory and in fact untrue: *Watt v. Longsdon* [1930] 1 KB 130. These occasions are called occasions of qualified privilege. A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty although it contains a criminatory matter which, without this privilege, would be slanderous and actionable: *Harrison v. Bush* [1885] 5 E & B 344; 119 ER 509. The duty may be legal, social or moral, and the person to whom the communication is made must have a corresponding interest or duty to receive it. The reciprocity is essential: *Adam v. Ward* [1917] AC 309 334.

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Clearly as Secretary of PAK, the respondent and members of PAK had mutuality of interest in the content of the report and the findings of the task force. It was also a matter of social responsibility that the issues raised in the

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report be investigated and the outcome made known to members of the very organisation whose management of their welfare homes were challenged. Therefore the briefing was clearly an occasion of qualified privilege. Citing *Jameel (Mohammed) and Another v. Wall Street Journal Europe SPRL (No 2)* [2007] 1 AC 359, learned counsel for the appellant argued that the respondent had failed to meet the tests set out in *Reynolds v. Times Newspapers Ltd* [2001] 1 AC 127. The short answer to this contention is that the respondent did not rely on the *Reynolds* defence. The qualified privilege pleaded by the respondent was the well-established common law qualified privilege referred to above.

[35] However, both the defences of fair comment and qualified privilege would fail, if actual or express malice is established against the respondent. In *Tun Datuk Patinggi Hj Abdul-Rahman Ya'kub*, at p. 413 of the report, His Lordship Richard Malanjum J (as he then was) stated that:

> It is a settled law that malice can be established by way of intrinsic and extrinsic evidence.
>
> Express malice was given a broad meaning by our then Supreme Court as malice in the popular sense or desire to injure the person who is defamed (see *S Pakianathan v. Jenni Ibrahim* [1988] 2 MLJ 173). Instances of malice have been accepted by our courts as ill-will or spite or some previous quarrels or bad relationships or any indirect or improper motive in the mind of a defendant at the time of publication and actuating it. Malice can defeat both defences of qualified privilege and fair comment (see *Rajagopal*'s case). Malice can also be inferred where a defendant made a defamatory statement knowing it to be false, or he did not believe what he published was true, or that he made it recklessly, not caring whether it was true or false; or where he deliberately stopped short in his inquiries in order not to ascertain the truth. Generally, honest belief to the truth of the statement is sufficient to negate malice. But, if it can be shown that the dominant motive of a defendant in making the statement was to vent personal spite or the desire to injure or to obtain private advantage or some other purposes rather than in the exercise of the relevant duty, then honest belief itself is not sufficient to rebut express malice.

In her reply to the amended statement of defence, the appellant pleaded that the respondent was actuated by malice. The appellant then provided what she claims to be particulars of malice. The particulars provided were however, predicated upon failure on the part of the respondent to investigate the accuracy of the task force's report. This court is not persuaded that what was provided as particulars of malice was warranted. The intent of the briefing was to share with the members of PAK the findings of the task force in regard to the report. The fact that the briefing was given after the investigation by the task force had been completed, and its conclusions given, supported the contention that there was no malice towards the appellant. In addition, the respondent had no dealings with the appellant. The respondent had never met

A the appellant until the occasion of a mediation meeting, after the action was filed. As such, there was no reason why the respondent would have had any malicious intent towards the appellant.

[36] Having regard to the foregoing, I do not find that the learned Sessions Court Judge had erred in holding that the defences of fair comment and
B qualified privilege were made out.

[37] The learned Sessions Court Judge also found that the defence of justification was made out. As to this, the learned Sessions Court Judge relied heavily on the investigations of the findings of the task force, the PDRM and
C the JKM. However, it seems to this court that something more fundamental was overlooked. The defence of justification, as it were, was pleaded by the respondent in his amended statement of defence in the following manner:

> 13. Kecuali setakat bahawa suatu Mesyuarat Agung Tahunan Pertubuhan Al-Khaadem telah diadakan pada 28.03.2016 ("Mesyuarat Agung"),
> D Defendan tidak setuju dan menafikan perenggan 7 dan 8 Penyataan Tuntutan Terpinda Plaintif. Dalam hal ini, Defendan menyatakan seperti berikut:
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> 13.1 Sebelum Mesyuarat Agung diadakan, beberapa mesyuarat Jawatankuasa Induk telah diadakan, termasuklah pada 30.01.2016 dan 21.02.2016, bagi membincangkan, antara lain Laporan Plaintif
> E serta hasil dapatan ('findings') Task Force Al-Khaadem tersebut. Bagi menjelaskan hasil dapatan Task Force tersebut, mesyuarat Jawatankuasa Induk tersebut telah membuat keputusan agar Defendan memberi maklumat kepada ahli Pertubuhan mengenai Laporan Plaintif serta langkah-langkah yang diambil oleh pihak
> F Pertubuhan, termasuklah hasil dapatan Task Force Al-Khaadem yang ditugaskan untuk menyiasat Laporan Plaintif tersebut.
>
> 13.2 Selepas Mesyuarat Agung selesai, suatu penerangan telah diadakan kepada ahli-ahli Pertubuhan mengenai Laporan Plaintif yang tersebar luas mengenai pengendalian Home of Hope. Bagi tujuan penerangan tersebut, Defendan telah menyediakan
> G 'powerpoint presentation' yang di antara lain mengandungi petikan-petikan Laporan Plaintif sendiri, serta hasil dapatan Task Force Al-Khaadem.
>
> 13.3 Ahli Jawatankuasa Induk Al-Khaadem hadir dalam sesi penerangan tersebut. Defendan telah secara umumnya
> H menggunakan bahasa Inggeris untuk memberi penerangan tersebut di mana Defendan telah membincangkan hasil dapatan Task Force Al-Khaadem yang mendapati bahawa laporan serta tuduhan, dakwaan atau gambaran Plaintif mengenai layanan penghuni Home of Hope adalah tidak benar.
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> I ...

16. Sebaliknya penerangan Defendan serta perkataan-perkataan yang digunakan oleh Defendan berupa komen berpatutan tentang perkara kepentingan awam bersabit Home of Hope yang dikendalikan oleh Pertubuhan Al-Khaadem bagi anak-anak yatim atau anak-anak daripada keluarga susah/bermasalah. Defendan juga akan bergantung kepada seksyen 9 Akta Fitnah 1957.

BUTIRAN FAKTA DAN PERKARA YANG MANA KOMEN ITU BERASAS

(a) Komen serta penerangan Defendan adalah berasaskan penyiasatan yang dijalankan sendiri oleh Jawatankuasa Induk Al-Khaadem sebagaimana yang dinyatakan dalam perenggan 9 di atas;

(b) Pertubuhan Al-Khaadem juga telah membuat laporan Polis mengenai Laporan Plaintif, tetapi tiada tindakan lanjut daripada pihak Polis mengenai Laporan Plaintif tersebut. Jika sekiranya terdapat unsur penderaan atau penganiayaan kanak-kanak di Home of Hope tersebut, sudah tentu pihak Polis telah mengambil tindakan yang sewajarnya; dan

(c) Lawatan rutin serta pemeriksaan oleh Jabatan Kebajikan Masyarakat ke Home of Hope tidak mendapati sebarang penganiayaan/penderaan atau perlakuan terhadap penghuni Home of Hope sebagaimana yang cuba digambarkan Plaintif di dalam Laporan beliau.

17. Selanjutnya dan/atau secara alternatif Defendan mengatakan bahawa kenyataan Defendan mengenai Laporan Plaintif dalam penerangan tersebut sebagaimana yang dinyatakan dalam perenggan 13 di atas mengikut makna lazim dan biasa dan makna sindiran adalah benar dari segi fakta dan isi.

BUTIRAN

Defendan mengulangi butiran di perenggan 16 di atas.

Jika perlu, Defendan juga akan bergantung kepada seksyen 8 Akta Fitnah, 1957

Thus, the statements that were averred in para. 17 of the amended defence to be true or correct were those pleaded in para. 13. However, what were pleaded in para. 13 were not the impugned statements.

[38] Learned counsel for the appellant submitted that the respondent's plea of justification was not sufficient. Learned counsel maintained that there was non-compliance with O. 78 r. 3(2) of the Rules of Court 2012 such that what was sought to be justified was not determinable. Order 78 r. 3(2) of the Rules of Court 2012 states as follows:

3. Obligations to give particulars (O. 78 r. 3)

(1) ...

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(2) Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he must give particulars stating which of the words complained of he alleges are statements

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of fact and of the facts and matters he relies on in support of the allegation that the words are true.

This non-compliance is not merely a technicality. More so in this case as what was sought to be justified was not the impugned statements. In *Morrell v. International Thomson Publishing* [1989] 3 All ER 733 at pp. 737- 738, May

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LJ stated:

... the position now is that a defendant who pleads justification must do so in such a way as quite clearly, without circumlocution or obfuscation, to inform the plaintiff and the court of precisely the meaning or meanings the defendant may seek to justify.

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Based on what was pleaded in the respondent's amended statement of defence, there was no plea of justification in respect of the impugned statements.

[39] There was however one other point of law that was raised and argued

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by the parties but in respect of which no finding was made by the Sessions Court. The respondent made the argument that no special or actual damage was proven by the appellant. The respondent also maintained that the alleged defamatory remarks were not such that fell within any of the exceptions under ss. 4 and 5 of the Defamation Act 1957. As such, it was contended

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that the alleged slander was therefore not maintainable.

[40] It is well-established that the tort of slander is not actionable *per se* save for the exceptions set out under ss. 4 and 5 of the Defamation Act 1957 which states as follows:

Slander of women

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4. Words spoken and published which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable.

Slander affecting official, professional, or business reputation

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5. In an action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of the publication, it shall not be necessary to allege or prove special damage whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business.

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In *Pardeep Kumar Om Parkash Sharma*, Suriyadi JCA described the tort of slander, in para. [23] of his judgment, in the following words:

> [23] I now briefly touch on the law of defamation in relation to slander. There is only one tort of defamation, though in reality the law of defamation consists of two separate civil actions, one being the action in libel and the other slander (*The Law of Defamation in Singapore and Malaysia* by Keith R Evans; *Principles of the Law of Tort in Malaysia* by Wan Azlan Ahmad and Mohsin Hingun). We are only concerned with the latter action in this appeal. Slander consists of spoken words, gestures or inarticulate but significant sounds, with emphasis more on the hearing, and hence not in a more permanent form as compared to libel. In a nutshell it is transient in nature. **Slander is actionable on proof of special damage which in layman's term means actual damage that is capable of being estimated in money**. Slanderous words, irrespective, will be actionable *per se* in four instances, with the relevant one for purposes of this case, being if the words impute the commission of a crime for which the plaintiff may be punished corporally as opposed to a mere fine (*C Sivanathan v. Abdullah bin Dato Haji Abdul Rahman* [1984] 1 MLJ 62; yet in *Luk Kai Lam v. Sim Ai Leng* [1978] 1 MLJ 214 the court saw it fit to hold that consistent slander against a lawyer for non-payment of rental was actionable *per se*, implying that in certain special circumstances the list may be expanded). Corporal punishment includes imprisonment, whipping and hanging. As the allegation against the respondent was kidnapping his action against the appellants was actionable *per se*.
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> (emphasis added)

Although the appellant pleaded a claim for special damages, the particulars provided disclosed that these were in the form of mental and emotional distress, problems with self-confidence and difficulty in getting a job. Whether mental or emotional distress come within the meaning of special damages for the purposes of slander is dubious. The learned editors of *Gatley on Libel and Slander*, 11th edn, states at 155 para 5.2 as follows:

> What constitutes special damage. Special damage for this purpose is some "actual temporal loss" - the loss of some "material" or "temporal advantage" which is "pecuniary" or "capable of being estimated in money". Or, to put it another way, in cases of slander not actionable *per se*, the law does not presume that damage will be suffered from the publication and the distress felt by the claimant at the injury to his reputation is not sufficient to found his cause of action.

In any event, there was no evidence provided by the appellant of her alleged special damages, save for her mere say so. Under cross-examination, the appellant conceded that she had not provided any evidence of any failure to secure a job or any medical evidence of her mental condition or indeed, of any of her alleged special damages.

[41] Learned counsel for the appellant however, argued that the slander was such as would come within s. 5 of the Defamation Act 1957. It was argued that the slander was in respect of words calculated to disparage the appellant in her profession or calling as a "caretaker". However, the appellant was no caretaker. In her own statement of claim, the appellant states that she was a "*Pentadbir Media & Publisiti" (Media & Publicity Administrator)* in the Home of Hope. Furthermore, the alleged slander made no reference to her position or the function or role the appellant served in the Home of Hope. The alleged slander was about what the appellant had portrayed in her report. Suffice to say that no special or actual damage was proven and, on this ground as well, the appellant's cause of action in the tort of slander was not made out.

Conclusion

[42] Having regard to the foregoing, and for the reasons given, the appellant's appeal is dismissed with costs of RM10,000.